

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Revision of the Commission's Rules
to Ensure Compatibility with Enhanced
911 Emergency Calling Systems

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CC Docket No. 94-102
RM-8143

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR STAY

The Rural Cellular Association ("RCA"), pursuant to 47 C.F.R. §1.43, hereby submits its Petition for Stay of the implementation of amended Sections 20.18(d) and (j) of the Commission's Rules. RCA has filed a Petition for Reconsideration ("Petition") of the Commission's Second Memorandum Opinion and Order ("Second MO&O") in the above-captioned proceeding in which the Commission amended these rules.¹ RCA's members, small and rural wireless licensees, are directly and adversely affected by the Order.²

RCA seeks a stay pending the Commission's consideration of its Petition seeking reconsideration of the Commission's Second MO&O. The Second MO&O amends existing Enhanced 911 ("E-911") service rules by eliminating a critical precondition for implementation of E-911 service, that a carrier cost recovery mechanism be in place. As a result of this fundamental change in the rules, small and rural carriers and their customers will be severely and unfairly

¹ See 64 Fed. Reg. 72951 (Dec. 29, 1999).

² Corr Wireless Communications, L.L.C. (fka CorrComm, L.L.C.), also a petitioner for reconsideration of the Second MO&O, supports this request for stay.

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burdened by E-911 implementation costs. RCA seeks a stay of the amended rule, scheduled to become effective on April 27, 2000, during the pendency of the Commission's consideration of the petitions for reconsideration.

The criteria for grant of a stay, established in Virginia Petroleum Jobbers, Assn v. FPC³, and Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc.⁴ are met in this case because (1) RCA is likely to prevail in its petition for reconsideration; (2) RCA's members will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest.

(1) RCA is Likely to Prevail in its Petition for Reconsideration

RCA is likely to prevail because of the following:

(a) The FCC's Second MO&O ignores the impact of eliminating carrier cost recovery mechanisms on small, rural carriers. As demonstrated in RCA's Petition, in its Second MO&O, the Commission dismisses as insignificant rural carriers' high cost of implementing E-911 service, an issue that previously was of decisional significance to the Commission.⁵ In a similarly dismissive manner, the Commission rejects pooling of carrier costs, based on its observation that wireless rates are not regulated. Not only does this approach ignore the fact that wireless carriers are, in fact, heavily regulated in other regards,⁶ but this approach is also non-responsive to RCA's position that

³ 259 F.2d 921, 925 (DC Cir. 1958) ("Virginia Petroleum").

⁴ 559 F.2d 841, 843 (DC Cir 1977) ("Washington Metro").

⁵ See RCA's Petition at 2-4.

⁶ Wireless carriers are required to implement E-911 service, and comply with a vast number of FCC regulations some of which are extremely costly, e.g., CALEA.

the anti-competitive effect of subscriber-based cost recovery is potentially devastating to small carriers. See generally, RCA's Petition at 4.

(b) The FCC's decision ignores the recommendations of two public safety organizations, NENA and NANSAs. In the most recent, August 1999 Implementation Report of the Consensus parties, NENA and NANSAs urge the Commission to reject the carrier self-recovery method of "bill and keep" proposed by the other public safety organization, APCO. Yet, the Commission chose to adopt APCO's "bill and keep" proposal despite overwhelming support for carrier funding mechanisms.

(c) The FCC decision to eliminate carrier cost recovery as a precondition is an "ends justify the means" approach, not a decision based upon the record. Only one of the members of the "Consensus Agreement" favored self-recovery of carrier costs over the existing process whereby states and localities establish cost recovery mechanisms. The Commission rejected the recommendations of the majority of Consensus parties and carriers that it provide specific guidance to states to facilitate and accelerate state implementation of cost recovery mechanisms. Instead, the Commission chose the administratively "easier" option of eliminating the carrier cost recovery precondition altogether. In earlier proceedings, the Commission considered and correctly rejected "bill and keep" as a cost recovery method. The basis for the Commission's rejection of a "bill and keep" cost recovery mechanism has not changed, nor does the record support the Commission's abandonment of its former position.

(d) In its Second MO&O, the Commission failed to consider ways in which it could lessen the burden for small, rural carriers when it eliminated the cost recovery precondition, such as providing guidelines for an expedited waiver from E-911 service requirements for small, rural

carriers. For example, the Commission has used the waiver process in the context of E-911 implementation in the past, to address the technological disparities among carriers in the area of handset versus network solutions. Similarly, in this instance, the Commission could establish conditions under which a small, rural wireless carrier in a jurisdiction that does not have a mechanism in place for recovery of its E-911 services costs could obtain a waiver in order to defer E-911 implementation.

(2) RCA's Members Will Suffer Irreparable Harm in the Absence of a Stay

The amended rule will become effective on April 27th if the Commission does not act on RCA's Petition or initiate a stay. If allowed to take effect, the amended Rule will require that wireless carriers recover their actual costs of providing 911 services from their own customers. This "bill and keep" approach will impose irreparable harm on RCA's members who are smaller, rural carriers as well as their customers because the typically higher cost of providing service would be spread over a smaller customer base, resulting immediately in potentially ruinous competitive damage. Preservation of the status quo pending a decision on the underlying Petition is necessary to avoid irreversible adverse consequences.

(3) A Stay Will Not Injure Other Parties

A stay of the Commission's amended rule would not injure other parties. The existing process, which has been in effect since April 1, 1998 for Phase I E-911 implementation, has received wide support from all but one of the members of the consortium of public safety organizations and wireless industry organizations whose "Consensus Agreement" was the basis for the FCC's E-911 rules. A temporary stay of the rule modification does not result in injury either to parties or the public.

(4) A Stay is in the Public Interest.

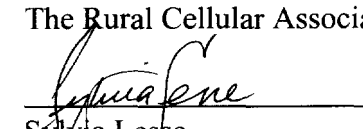
A stay of the implementation of the Commission's amended rule is in the public interest because, as RCA demonstrates in its Petition, the record, as well as the FCC's own observations, lead to the conclusion that carrier cost recovery mechanisms are important to rural consumers and should be retained. The public is served by promoting and enhancing competition among service providers, a result which is endangered by the "bill and keep" approach. Assuming, arguendo, the existence of competing public policy goals, unsupported and precipitous sacrifice of one goal to another is contrary to the public interest. A temporary stay pending final decision in this matter is consistent with the public interest in maintaining a rational decision-making process.

For the foregoing reasons, it is respectfully requested that the Commission stay its Order in the above-referenced proceeding.

Respectfully submitted,

The Rural Cellular Association

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April 21, 2000

CERTIFICATE OF SERVICE

I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Petition for Stay" of The Rural Cellular Association" was served on this 21st day of April 2000, by first class, U.S. Mail, postage prepaid to the following parties:


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